82-1833

No. ———

IN THE

Supreme Court of the United States

October Term, 1982

ANGEL SANTIAGO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

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Questions Presented.

1. Whether Petitioner was denied a fair trial when the mother of the deceased in this murder case suddenly screamed aloud in the presence of the jury "I'm the mother . . . They killed my son. Both of them killed my son. I'm the mother. They killed my son!"? (Fifth and Fourteenth Amendments, U.S. Const.)

2. Whether the failure of the Trial Judge to grant a mistrial upon timely application of the Petitioner, when the mother of the deceased screamed out in front of the jury that he had killed her son, precluded a fair trial?

3. Whether a proper *voir dire* of the jurors was conducted when the Trial Judge simply asked the jurors *en masse*, and not separately and apart from each other, whether they had been prejudiced when they heard the mother of the deceased scream out in the courtroom that the Petitioner had killed her son?

4. Whether the evidence was sufficient to have warranted submission of this case to a jury? (Fourteenth Amendment, U.S. Const.)

Parties.

The parties to the proceeding in the Court below were THE PEOPLE OF THE STATE OF NEW YORK and ANGEL SANTIAGO.

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IN THE

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Opinion Below.

The Court below affirmed without opinion. The denial of leave to appeal by an Associate Judge of the Court of Appeals was also without opinion.

Jurisdiction.

Petitioner was charged with the crime of murder second degree and possession of a weapon in the second degree, in the Supreme Court, Kings County. After trial before

Honorable Aaron Bernstein and a jury, Petitioner was convicted of the crimes of manslaughter first degree and criminal possession of a weapon in the second degree, and sentenced to a term of 3 to 9 years imprisonment on the manslaughter charge, and to 1½ to 4 years concurrently on the weapons violation.

The charges were predicated upon a fight which degenerated into a general melee in the hallway of a Brooklyn apartment house, as a result of which the victim herein was killed. There was no unequivocal evidence that the Petitioner had fired the fatal shot, nor that he even possessed a gun.

The jurisdiction of this Court is invoked under Sections 1254 and 1257 of Title 28 of the United States Code.

The Appellate Division, Second Department, affirmed the judgment of conviction on the 28th day of February, 1983, and on the 24th day of March, 1983, an Associate Judge of the New York Court of Appeals denied leave to appeal.

Copies of the orders of the Appellate Division, and the certificate denying leave to appeal, are annexed as part of the appendix. No opinion was written by the Courts below.

Constitutional and Statutory Provisions Involved.

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein. Both of these Constitutional provisions are cited with respect to their requirement that no defendant in a criminal prosecution be deprived of life, liberty or property without due process of law.

In addition, Sections 125.20 and 265.03 of the New York Penal Law are also involved. The pertinent portions of those Sections are as follows:

PENAL LAW §125.20—Manslaughter in the first degree.

In pertinent part, this Section provides that a person is guilty of manslaughter in the first degree when "with intent to cause serious physical injury to another person, he causes the death of such person or to another person . . ."

Manslaughter in the first degree is a Class B felony.

PENAL LAW §265.03—Criminal possession of a weapon in the second degree.

This Section provides that a person is guilty of criminal possession of a weapon in the second degree when he possesses a loaded firearm with intent to use the same unlawfully against another.

Criminal possession of a weapon in the second degree is a Class C felony.

A *B* felony is punishable by up to 25 years imprisonment.

A *C* felony is punishable by up to 15 years imprisonment.

PENAL LAW §125.25—Murder in the second degree.

A person is guilty of murder in the second degree when, with intent to cause the death of another person, he causes the death of such other person or of a third person . . .

Murder in the second degree is an A felony.

An *A* felony is punishable by life imprisonment.

Historical Background of the Case.

The evidence at trial revealed that the Petitioner and a number of other persons, including the deceased, engaged in a general melee in the hallway of a tenement building in Kings County.

With the exception of one witness, whose credibility was severely impaired, no one was able to testify that the Petitioner had a gun.

Hilda Aponte, who was an admitted heroin addict and related to the deceased, was the sole witness who claimed that she saw Petitioner shoot a gun at the deceased. She conceded, however, at the trial, that her earlier testimony had been that she never saw a gun in Petitioner's hand and, in addition, that she had never told anyone about seeing the gun previously (330, 339; 353-356a)*.

Alicia Ortiz testified for the defense that she had spoken to this witness, Hilda Aponte, and was told that Hilda informed her that she really didn't know who had shot the guy but she didn't care because she wanted "someone to pay for her brother's death" (544).

During the trial, shortly before the charge to the jury and its deliberations, a woman suddenly stood up in the courtroom and shouted in open court in the presence of the jury:

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

> "I'm the mother. Your Honor. I'm the mother. They killed my son. Both of them killed my son. I'm the mother. They killed my son!"

A motion for a mistrial was immediately made (570), but the Court declined to grant one.

Both the Court and the prosecutor, to say nothing of the defense counsel, conceded that the incident was extremely prejudicial (571).

At the time of the sentence, the Trial Judge indicated that he had severe reservations as to whether the defendant-petitioner was actually guilty, but refused to set aside the verdict. Thus, at the sentence (Sentence Minutes, pp. 4 and 5), the Trial Judge declared:

> "I did hear the entire trial, and as you know, I'm sure you have conveyed it to your client Santiago I had heard the case. *I was not as convinced as the jury that the defendant fired the shot, but I don't make those decisions,* and if I were to set aside this verdict, I would be performing the function of a jury, which I am not entitled to do, and for me to do that would be error.
>
> *"Perhaps the Appellate Division, when it hears this appeal will reach a contrary conclusion, that the People didn't prove the case beyond a reasonable doubt.*
>
> "Because of the facts, and because of the fact the defendant submitted himself voluntarily to the lie detector test, established that he was—indicated that he was telling the truth, that he didn't commit the crime, that he didn't have the gun, . . ."

Reasons for Granting the Writ.

I.

The jurors were irretrievably prejudiced when the mother of the deceased suddenly stood up in open court and shouted that she was the deceased's mother and that the petitioner had killed her son. The Court and both parties conceded that there was severe prejudicial error committed, but nonetheless, a mistrial was denied. The general inquiry by the Court of the jurors, *en masse,* and not separately and apart from each other, was inadequate to mitigate the prejudice. Such misconduct affecting jurors requires a new trial before an impartial jury.

If the jurors in the case at bar had been exposed to newspaper publicity consisting of a quotation from a person purporting to be the mother of the deceased, announcing that the Petitioner had murdered her son, there would be little doubt but that severe prejudice would have occurred affecting the ability of the jurors to remain impartial. To say the very least, the Court would necessarily have had to inquire of each juror, separately and apart from the others, whether or not such publicity affected their ability to remain impartial (see *Marshall v. United States,* 360 U.S. 310, 3 L.Ed.2d 1250 [1959], and *United States v. Lord,* 565 F.2d 831, 2 Cir. 1977).

In the *Lord* case, the Court of Appeals aptly explained the rule as follows (565 F.2d at 838, 839):

> "The guidelines to be followed by a district court confronted with the problem of publication or broadcast of information concerning an ongoing criminal trial have been indicated by us. See, e.g.,

United States v. Pfingst, 477 F.2d 177, 186 (2d Cir. 1973); *United States v. Bentvena,* 319 F.2d 916, 934 (2d Cir.), *cert. denied,* 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963); *United States v. Aqueci,* 310 F.2d 817, 831-32 (2d Cir.), *cert. denied,* 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). Accord, *United States v. Perrotta,* 553 F.2d 247 (1st Cir. 1977); *United States v. Pomponio,* 517 F.2d 460 (4th Cir. 1975); *United States ex rel. Greene v. New Jersey,* 519 F.2d 1356 (3d Cir. 1975); *Margoles v. United States,* 407 F.2d 727 (7th Cir. 1969); *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968). See also American Bar Association Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press §3.5(f) (1968). First the court must decide whether the publicity contains potentially prejudicial information, and whether the members of the jury might have been exposed to it. If the broadcast or article contains no information beyond the evidence in the case, or if the information is clearly innocuous or the possibility of the jury's exposure to it is remote, further inquiry may not be necessary. If, however, the court determines that the article or broadcast has a potential for unfair prejudice, then an initial inquiry of the jury is necessary to ascertain whether any of its members have been exposed to the information. Any juror who responds that he or she has been so exposed should be *examined individually, out of the presence of the other jurors, to determine the extent of the exposure and its effect on the juror's attitude toward the trial.* This precautionary procedure should permit the court to determine what further steps, if any, are required to insure that the trial proceeds fairly." (Emphasis ours.)

In the case at bar, a much more dramatic thing occurred than newspaper publicity.

In open court, in the presence and hearing of all the jurors, a woman, announcing herself as the mother of the deceased, shouted accusatorialy that the Petitioner had killed her son, and said it more than once.

The Court did not ameliorate this prejudice by granting a mistrial, but instead, questioned the jurors *en masse,* and not separately and apart from each other, as to whether they were prejudiced. He, of course, told them to disregard the outburst.

We must bear in mind, however, that these jurors had to come into the courtroom and face this mother, and how difficult would it be for anyone to face the mother of a person who was killed and announce a "not guilty" verdict.

In addition, it is inconceivable that the jurors could not have been prejudiced by this, or that the simple inquiry by the Court, without careful and separate interviews, could possibly have ameliorated the prejudice.

In the *Marshall* case, it should be noted that the Supreme Court of the United States indicated that where only three jurors had read a news article that was prejudicial to the defendant, a reversal of the conviction was required. In making an analogy in the *Marshall* case, the Supreme Court indicated that such outside publicity was "almost" as bad as having it introduced in evidence at the trial.

In the case at bar, as this Court will note, the mother of the deceased stood up in open court in the presence of all the jurors and screamed that the Petitioner had killed her son, that she was the mother, and repeated it.

Unlike what was done in the *Marshall* decision, the Court herein did not poll the jurors separately and apart from each other, but, instead, inquired *en masse* as to whether or not they had suffered prejudice. Such a *voir dire* of the jurors after such an incident is incapable of rectifying the prejudice.

In *Rideau v. Louisiana,* 373 U.S. 723, 10 L.Ed.2d 663, the Supreme Court of the United States emphasized that it was essential that a defendant in a criminal case receive a fair trial before an impartial jury. Once a jury has been tainted with extraneous evidence or publicity of a virulent type, it is impossible to assure a fair trial to an accused from that point on.

In the case at bar, obviously, all twelve jurors heard the accusations of the mother and, on top of it, knew that they would have to face that mother when they came out to announce their verdicts. Under the circumstances, we maintain that it was impossible to have a fair trial.

The only remedy was a mistrial, which was timely requested, and which the Court reluctantly denied after the prosecution assured the Judge that it would try to protect him on an appeal.

II.

The evidence at trial consisting of the equivocal testimony of the sister of the deceased, who alone identified the defendant as the killer, was insufficient and inadequate as a matter of law to have been presented to a jury for deliberations. The Court failed to exercise its judicial functions, which should have been to dismiss at the close of the prosecution's case, because of insufficiency of evidence. This is illustrated further by the fact that at sentence the Trial Judge expressed grave misgivings about the guilt of the Petitioner.

The evidence at trial, as revealed by the sentiments expressed by the Trial Judge at the time of sentence, was grossly insufficient to have warranted presentation of the case to a jury. Only one witness, namely the deceased's sister, gave an equivocal statement that the Petitioner was the killer. She conceded that she had given inconsistent testimony previously, and another witness informed the jurors in court that Hilda Aponte, the sole witness to whom we referred, had indicated that she was inventing the story and merely wanted someone to pay for her brother's death.

We believe that *United States v. Taylor,* 464 F.2d 240 (2 Cir. 1972), graphically epitomizes the functions of a Trial Judge under such circumstances:

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See *Capital Traction Company v. Hof,* 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must

determine whether the proponent had adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence §2494 at 299 (3d ed. 1940), the best statement to the test to be that of Mr. Justice Brett in *Bridges v. Railway Co.* [1874] L.R. 7 H.L. 213, 233:

> "[A]re there facts in evidence which if answered would justify men or ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> "It would seem at first blush—and we think also at second—that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. *In re Winship,* 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). We do not find a satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

We believe, therefore, that the Trial Judge abdicated his responsibilities, as indicated by his sentiments at sentence, that he was very much disturbed by the sufficiency of evidence against the defendant-petitioner.

Under these circumstances, this Court should set guidelines for judges, who should be admonished not to

present cases to lay jurors when they feel that there is a reasonable doubt that is clearly presented by the evidence and thus jurors should not be permitted to speculate on guilt under those circumstances.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK and
MICHAEL M. CHASEN
Attorneys for Petitioner

IRVING ANOLIK
Of Counsel

APPENDIX.

Certificate Denying Leave to Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

Before: Hon. Richard D. Simons, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

against

ANGEL SANTIAGO

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 24, 1983

RICHARD D. SIMONS
Associate Judge

*Description of Order: Appeal from an order of the Appellate Division, Second Department, dated February 28, 1983 which affirmed a judgment of Supreme Court, Kings County, entered February 9, 1982.

Order of the Appellate Division, Second Department, Dated February 28, 1983.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 28, 1983.

Hon. Vito J. Titone,
Justice Presiding,
Hon. Frank A. Gulotta,
Hon. Moses M. Weinstein,
Hon. Lawrence J. Bracken,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

ANGEL SANTIAGO,

Appellant.

3510/80

In the above entitled action, the above named Angel Santiago, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered February 9, 1982; and the said appeal

having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Bruce B. Berger, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that this case is hereby remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Certification.

I, IRVING ANOLIK, a member of the bar of this Court, certify that a copy of the within Petition was duly served by First Class Mail on the 10th day of May, 1983, on the District Attorney, Kings County, by depositing a true copy thereof in a depository of the United States Post Office, addressed to the District Attorney, Kings County, Municipal Building, Brooklyn, New York 11201.

Dated: New York, New York
May 10, 1983.

IRVING ANOLIK